STATE OF MICHIGAN

COURT OF APPEALS

SUE E. RADULOVICH, P.C.,

Plaintiff-Counter-Defendant-Appellee,

v

JOANN EVOLA,

Defendant-Counter-Plaintiff-Appellant,

and

KATHLEEN STEFANI SCHULTZ,

Intervening Defendant-Counter-Plaintiff-Plaintiff.

UNPUBLISHED
April 24 2001

No. 217630
Wayne Circuit Court
LC No. 96-631143-CK

SUE E. RADULOVICH, P.C.,

Plaintiff-Counter-Defendant-Appellant,

v

JOANNE EVOLA and KATHLEEN STEFANI SCHULTZ,

Defendants-Counter-Plaintiffs-Appellees.

No. 217780
Wayne Circuit Court
LC No. 96-631143-CK

Before: O'Connell, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

In Docket No. 217630, defendant Joann Evola appeals by delayed leave granted the April 22, 1998, order granting plaintiff Sue E. Radulovich, P.C.'s motion for summary disposition, dismissing Evola's answer and counterclaim, and denying her motion to amend her answer and counterclaim. Evola also appeals the July 17, 1998, order awarding plaintiff sanctions in the amount of $40,000 against her personally pursuant to MCR 2.114(F).

In Docket No. 217780, plaintiff appeals by delayed leave granted the July 17, 1998, order denying her requests for costs and interest, and denying her sanctions against defendant Kathleen Stefani Schultz and her attorney, Kevin Smith, and Evola's attorney, Michael Alan Schwartz. Plaintiff also appeals by delayed leave granted the February 3, 1999, order limiting payment of the sanctions to installment payments from Evola's monthly settlement proceeds.

These appeals are yet another round of appeals in this continuing battle between plaintiff and Evola regarding plaintiff's entitlement to attorney fees. In August 1994, Evola slipped and fell in a restroom owned by the Detroit and Canada Tunnel Corporation. According to plaintiff, Wayne Circuit Judge Andrea Ferrara referred Evola to plaintiff and Evola contacted her for the purpose of representing her. In October 1994, plaintiff and Evola entered into a retainer agreement whereby plaintiff would file a personal injury claim on Evola's behalf. The agreement provided that Evola agreed to compensate plaintiff one-third of the net recovery for plaintiff's services.

Plaintiff reached a settlement with Detroit/Windsor Tunnel for $990,000, and was waiting for Evola to sign the settlement agreement. The record reveals that a check for $325,960 was drafted on February 20, 1996, and was made payable to plaintiff and Evola. According to plaintiff, Ferrara demanded that plaintiff pay her a referral fee, and after she refused, Evola discharged her in March 1996 and retained the services of defendant Schultz, who apparently is Ferrara's cousin.

According to defendants, plaintiff agreed to limit her fee to $250,000, but wanted Evola to sign a new retainer agreement indicating that the fee was $50,000 and then wanted Evola to pay $200,000 in cash. Due to this demand and the fact that plaintiff solicited Evola while she was in the hospital, Evola hired Schultz and terminated plaintiff's services.

Evola signed the structured settlement agreement on March 8, 1996. On July 1, 1996, plaintiff filed a complaint against Evola and Schultz for breach of contract and an accounting. Plaintiff requested $330,000 as attorney fees owing under the retainer agreement, as well as costs, interest, and attorney fees.

Evola, who retained Schwartz, filed an answer and counterclaim, raising allegations of professional misconduct and a claim of breach of fiduciary duty based on plaintiff's refusal to endorse the settlement check. Evola alleged that she never signed the retainer agreement[1] and that plaintiff performed virtually no services for Evola.

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[1] Evola later admitted that it was her signature on the retainer agreement.

By agreement of the parties, the check was endorsed and the funds were placed in escrow in an interest-bearing account.

A stipulation to dismiss Schultz from the case without prejudice and without costs was entered on January 27, 1997. However, on March 18, 1997, Schultz filed a motion to intervene pursuant to MCR 2.209(A)(3), claiming an interest in the attorney fees based on her representation of Evola in the personal injury action. Schultz also filed a complaint seeking a declaratory judgment regarding the rights of the parties to the attorney fees.

In March 1997 plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (9), arguing that she had a valid contract for attorney fees that was signed by Evola, that she fully performed her obligation by settling the case and earned a one-third fee of $330,000, and that Evola failed to state a valid defense to her breach of contract claim.

The court issued an opinion on April 29, 1997, and entered an order on June 17, 1997, dismissing the allegations in Evola's answer and counterclaim relating to professional misconduct. The court also allowed Schultz to intervene. The court, finding that the real issue presented was the division of attorney fees between plaintiff and Schultz, ordered that any and all attorneys fees to which plaintiff and Schultz were entitled would be decided by the court acting as a fact finder and that in doing so, the court would resort to, among other things, the doctrine of quantum meruit.

In March 1998, plaintiff filed a combined motion for summary disposition pursuant to MCR 2.116(C)(8), (9) and (10) and for costs, sanctions, and attorney fees pursuant to MCR 2.114(E) and (F) and MCR 2.625. Plaintiff requested clarification as to what, if any claims, were remaining between herself and Evola. Plaintiff also argued that because all claims and defenses raised by Evola and Schultz were frivolous, she was entitled to attorney fees. Plaintiff also requested interest for the loss of use of her money.

Evola filed a motion to amend her answer and counterclaim, which omitted allegations of professional misconduct and added a claim seeking declaratory relief regarding Evola's entitlement to the entire proceeds of the check. The counterclaim sought a judgment that any proceeds to which plaintiff was entitled should be calculated pursuant to the termination of service provision in the retainer agreement, which was the number of hours of work performed multiplied by the hourly rate of $250.

In an order dated April 22, 1998, the court subsequently granted plaintiff's motion for summary disposition, and dismissed "the remaining answer and counterclaim of Joann Evola" that had not been previously dismissed.

On the day of the scheduled evidentiary hearing to determine the division of the attorney fees between plaintiff and Schultz, Schultz withdrew her pleadings. In an order dated June 5, 1998, the trial court dismissed Schultz as a party, ordered a release of the funds held in escrow to plaintiff, and ordered that the issues of awarding costs, sanctions, statutory interest and attorney fees were to be determined at an evidentiary hearing set for July 17, 1998.

Following an evidentiary hearing, the court ultimately ruled that Evola's pleadings were frivolous, but that there was no frivolous misconduct on the part of Schwartz, Schultz, and Smith. The court also denied plaintiff's request for interest and costs. In its July 17, 1998, order, the court ordered defendant Evola to pay plaintiff a sanction in the form of attorney fees in the amount of $40,000.

On August 12, 1998, plaintiff served an affidavit and writ of garnishment on First Colony Life Insurance, seeking to garnish the $3,035 monthly payments to Evola from the structured settlement agreement to satisfy the $40,000 judgment. First Colony filed a garnishee disclosure on August 21, 1998, indicating that the monthly payments were exempt from creditors under MCL 500.4054, 500.2207 and 600.6023(f)(1), and that it was obligated to pay in the future pursuant to an annuity contract, which was also exempt.

By order dated December 16, 1998, the court "in exercise of its equitable powers" ordered that 25% of the monies held in escrow and 25% of future monthly payments be paid to the attorney for plaintiff. In an order entered February 3, 1999, the court ordered that First Colony make future payments to the court over the next 48 consecutive months, which will then be disbursed as 25% to plaintiff and 75% to Evola. The court denied plaintiff's motion for stay and for costs, interest, and attorney fees.

This Court granted Evola's delayed application for leave to appeal the April 22, 1998, order and the February 3, 1999, order. This Court also granted plaintiff's delayed application for leave to appeal the July 17, 1998, order and the February 3, 1999, order. In Docket No. 217630, we affirm. In Docket No. 217780, we affirm in part and reverse in part.

Docket No. 217630

Evola first argues that the trial court erred by dismissing her remaining answer and counterclaim and by denying Evola's motion to amend her answer and counterclaim. A grant of summary disposition is reviewed de novo on appeal. *Beaty v Hertzberg & Golden, PC.,* 456 Mich 247, 253; 571 NW2d 716 (1997).

In her second motion for summary disposition, plaintiff argued that the contract was completed before Evola terminated her services, that Evola did not have a valid defense or counterclaim, and that she was therefore entitled to the full amount of the contingency fee under the retainer agreement. Evola responded that plaintiff was not entitled to any fee under the agreement because she was discharged before the settlement was completed.

The trial court did not actually decide the issue of whether plaintiff's services were complete before she was discharged. Although the court initially stated that it would decide the attorney fee dispute by resorting to quantum meruit, once Schultz withdrew her complaint the court awarded plaintiff the entire one-third fee.

Despite the court's failure to specify on which basis the fee was awarded, we find that plaintiff was entitled to the full amount of the contingency fee under the retainer agreement. The uncontroverted evidence shows that Evola obtained a recovery against Detroit and Canada Tunnel Corporation as a result of plaintiff's negotiations. The negotiations were completed,

plaintiff had received a check for attorney fees, and the only matter left to be completed at the time Evola discharged plaintiff was for Evola to sign the release. Essentially, plaintiff had performed one hundred percent of the services necessary to secure the settlement. Accordingly, the trial court did not err by granting plaintiff's second motion for summary disposition and in awarding plaintiff the entire contingency fee. Cf. *Morris v City of Detroit*, 189 Mich App 271; 472 NW2d 43 (1991) (contingency fee agreement no longer operates to determine attorney fee where attorney was discharged before completing one hundred percent of services). Further, because Evola's termination of plaintiff's services occurred after the fee was earned under the contract, the provision in the contract regarding hourly attorney fees in the event of termination of the agreement was inapplicable. Hence, the trial court properly denied the motion to amend on the basis of futility. *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656, 659; 213 NW2d 134 (1973).

Next, Evola argues that the trial court erred by granting sanctions against Evola pursuant to MCR 2.114(F) and MCL 600.2591; MSA 27A.2591. Pursuant to MCR 2.114(F), the pleading of a frivolous defense will subject the offending party to sanctions provided in MCR 2.625(A)(2), which states:

> In an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591; MSA 27A.2591.

Frivolous means that one of the following conditions has been met: (i) the party's primary purpose in asserting the defense was to harass, embarrass, or injure the prevailing party; (ii) the party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true; or (iii) the party's legal position was devoid of arguable legal merit. MCL 600.2591(3)(a); MSA 27A.2591(3)(a).

A trial court's finding that a claim is frivolous or vexatious is reviewed for clear error. *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 169; 550 NW2d 846 (1996). A trial court's decision is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997). In finding that Evola filed a frivolous pleading, the court stated "that the facts presented to the Court are such that this controversy on behalf of Ms. Evola should not have even gone one step," that the case was not well grounded in fact or law, and that it had some serious questions about the good-faith basis for the lawsuit by Evola.

The trial court did not clearly err in imposing sanctions against Evola. The record reveals that Evola made a false statement in her answer, raised allegations that were not meritorious in defense to plaintiff's breach of contract claim, and did not appear to have a good-faith basis for defending the action. Evola denied that she signed a retainer agreement, when in fact she did so. Evola's allegation that plaintiff criminally and unethically solicited her in the hospital was initially rejected by the police department and then subsequently by the attorney grievance commission. Given the allegations and the obvious animosity between the parties, we cannot

conclude that the court erred in finding that Evola did not have a good-faith basis in defending against plaintiff's claim for attorney fees.[2]

Docket No. 217780

Plaintiff first argues that the trial court erred by failing to award interest on the $325,960 judgment pursuant to the prejudgment interest statute, MCL 600.6013(5); MSA 27A.6013(5). The purpose of the statute is to provide compensation to a prevailing party for the delay in recovering money damages. *Giannetti v Cornillie (On Remand)*, 209 Mich App 96, 101-102; 530 NW2d 121 (1995). Here, the parties stipulated and agreed on September 11, 1996, to deposit the check "into this Court in an interest-bearing account." Having received equitable relief, plaintiff is not entitled to interest pursuant to the prejudgment interest statute. *McPeak v McPeak*, 233 Mich App 483, 497; 593 NW2d 180 (1999).

Plaintiff also contends that she was entitled to costs as the prevailing party pursuant to MCR 2.625(A)(1), which provides that costs will be allowed to the prevailing party pursuant to MCL 600.2591; MSA 27A.2591 "unless prohibited by statute or by these rules or unless the court directs otherwise." Under the statute, the court must award the reasonable costs and fees incurred by the prevailing party, including court costs and reasonable attorney fees. MCL 600.2591(1) and (2); MSA 27A.2591(1) and (2); *FMB-First Nat'l Bank v Bailey*, 232 Mich App 711, 721; 591 NW2d 676 (1998). "A trial court is not required to justify awarding costs to a prevailing party; rather, the court must justify the failure to award costs." *Id.* Although the court failed to explain its denial of costs and the matter should be remanded on this basis, plaintiff was entitled to costs under MCR 2.625(A)(2) upon the court's finding that the defense was frivolous. Therefore, the court abused its discretion in failing to impose costs in addition to the attorney fee.

Plaintiff also argues that the trial court erred by imposing sanctions only against Evola for filing frivolous pleadings and failing to impose sanctions against Evola's attorney, Michael Schwartz, and against defendant Schultz and Schultz' attorney, Kevin Smith. We disagree. The trial court specifically found frivolous conduct on the part of Evola alone and not on the part of her attorney. Hence, we find no abuse of discretion in an award of sanctions solely against Evola. See MCR 3.114(E) (the court shall impose upon the person who signed it [the frivolous pleading], a represented party, or both, an appropriate sanction).

Plaintiff's motion to impose sanctions against Schultz and her attorney, Kevin Smith, was based on their filing of the motion to intervene and complaint seeking a declaratory judgment regarding the rights to the fees being held in escrow. Plaintiff contends that Schultz testified under oath that she did not have a contingency fee agreement with Evola regarding the personal injury matter and, therefore, Schultz could not claim a lien on the fees being held in escrow.

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[2] Evola also argues that the trial court erred by prohibiting Evola from introducing evidence concerning plaintiff's alleged professional misconduct and dismissing those portions of Evola's answer and counterclaim. This issue is not properly before this Court. The order dismissing the allegations in Evola's answer and counterclaim relating to professional misconduct was entered on June 17, 1997, and Evola did not file an application for leave to appeal with regard to this order.

The record reveals that an agreement was signed between Evola and Schultz that provided that Evola retained Schultz "in the matter of concluding the settlement of a claim known as Joann Evola vs Detroit and Canada Tunnel Corp., discharging the services/representation of the undersigned's prior attorney, Sue Radulovich, and resolving any attorney fee dispute which may arise as the result from said discharge." The fee was "50% of the difference between $250,000 and the amount paid to Sue Radulovich for her prior representation, provided however, if the attorney fee dispute is litigated, arbitrated, mediated or resolved with the assistance of a third party, then the percentage paid to SMITH AND SCHULTZ, LLP shall be 75% of said difference."

We are not left with a definite and firm conviction that the trial court clearly erred in finding that these pleadings were not frivolous. In her complaint, Schultz stated that Evola retained her to represent her in her claim against Detroit/Canada Tunnel Corporation, that Schultz rendered legal services for which she had not been paid, and that she claimed a lien on the proceeds currently held by the court. Although Schultz indicated that she had an interest in the fees as a result of her representation of Evola in the underlying personal injury matter, she never asserted in the complaint or motion that she was entitled to the fees pursuant to the contingency fee agreement that was signed between herself and Evola. Because Schultz did provide some service to Evola in the underlying lawsuit, she may have been entitled to a portion of the proceeds (even if minimal) under a quantum meruit theory. Thus, it appears that Schultz and Smith did not make any false representations in their pleadings and their legal position was not devoid of arguable legal merit. MCL 600.2591(3)(a)(ii) and (iii); MSA 27A.2591(3)(a)(ii) and (iii).

Last, plaintiff argues that "the trial court erred by not allowing plaintiff to garnish the full amount of Evola's settlement proceeds or the full amount of the monthly payments made to Evola." Plaintiff has failed to provide this Court with a copy of the transcript of the hearing on the December 16, 1998, order to pay. Hence, this Court cannot analyze the merits of the trial court's ruling. An appellant has the burden of providing "the reviewing court with a record that verifies the basis of any argument on which reversal or other claim for appellate relief is predicated." *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 540; 506 NW2d 890 (1993). Further, plaintiff has provided no argument or citation to authority to support her arguments that she was entitled to interest and costs on the award of sanctions pursuant to MCL 600.6013; MSA 27A.6013 and that she is entitled to attach any non-wage, non-statutorily protected assets of Evola, without limitation. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Under these circumstances, we decline to review this issue.

In docket number 217630, we affirm. In docket number 217780, we reverse that part of the July 17, 1998, order denying costs and remand. We affirm that part of the July 17, 1998, order denying interest. We also affirm that part of the July 17, 1998, order denying sanctions against attorney Schwartz. We affirm the February 3, 1999, order limiting the garnishment.

Affirmed in part, reversed in part, and remanded. Jurisdiction is not retained.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder